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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	**Chapter 9**
NEW YORK CITY OFF-TRACK BETTING CORPORATION,	:	**Case No. 09-17121 (MG)**
Debtor.	:	

THE NEW YORK RACING ASSOCIATION, INC.'S (A) STATEMENT IN SUPPORT OF DISMISSAL OF CHAPTER 9 CASE AND (B) OBJECTION TO MOTION OF DISTRICT COUNCIL 37, LOCAL 2021 FOR APPOINTMENT OF TRUSTEE PURSUANT TO SECTION 926(a) OF THE BANKRUPTCY CODE TO PURSUE CAUSES OF ACTION TO AVOID AND RECOVER FRAUDULENT TRANSFERS MADE TO NEW YORK RACING ASSOCIATION, YONKERS RACING CORPORATION, EMPIRE RESORTS, INC., MONTICELLO RACEWAY MANAGEMENT, INC., MONTICELLO RACEWAY, FINGER LAKES RACING ASSOCIATION, INC., DELAWARE NORTH COMPANIES, DELAWARE NORTH COMPANIES GAMING & ENTERTAINMENT, INC., VERNON DOWNS AND TIOGA DOWNS

TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

The New York Racing Association, Inc. ("NYRA") files this (a) statement in support of the motion, dated December 15, 2010 (the "Dismissal Motion"), of New York City Off-Track Betting Corporation ("NYC OTB" or the "Debtor") to dismiss its chapter 9 case and (b) objection to the motion, dated December 22, 2010 (the " Trustee Motion"), of District Counsel 37, Local 2021 ("DC 37") for an order, pursuant to section 926(a) of title 11 of the

United States Code (the "Bankruptcy Code"), appointing a trustee to pursue alleged causes of action to avoid and recover fraudulent transfers made to NYRA, Yonkers Racing Corporation, Empire Resorts, Inc., Monticello Raceway Management, Inc., Monticello Raceway, Finger Lakes Racing Association, Inc., Delaware North Companies, Delaware North Companies Gaming & Entertainment, Inc., Vernon Downs and Tioga Downs (collectively, the "New York Tracks"), and respectfully represents as follows:

PRELIMINARY STATEMENT

1. Pursuant to the Dismissal Motion, the Debtor has exercised its statutory right and seeks to have its chapter 9 case dismissed. The Debtor's intention and rationale is clear. Despite all efforts, including the efforts of the statutory committee of unsecured creditors appointed in the Debtor's chapter 9 case (the "Creditors' Committee") to negotiate an acceptable and agreed upon plan of adjustment, NYC OTB could not survive. As a result, it ceased all operations, closed its doors and terminated all of its employees, but one or two. The inevitable result is that, without any future or pathway to a plan of adjustment, the chapter 9 case must be dismissed pursuant to section 930 of the Bankruptcy Code.

2. Notwithstanding, DC 37 has proposed the Trustee Motion so as to keep the chapter 9 case open, if only partially, so that alleged avoidance actions, which NYRA submits have zero merits, can be pursued by a court appointed trustee. DC 37 has not indicated which section of the Bankruptcy Code, or other authority, contains a provision or mechanism that would allow the Court to do so and NYRA is not aware of one.

3. DC 37 has also failed to demonstrate why the appointment of a trustee is appropriate or how DC 37 would be prejudiced if one were not appointed. Once the Debtor's case is dismissed, DC 37 will be able to pursue its rights under the New York Debtor Creditor

Law with respect to the alleged fraudulent conveyances. Accordingly, DC 37 would find itself in no worse position vis-à-vis its rights to pursue fraudulent conveyance actions without the appointment of a trustee. This Court should not be used as a sword to foist DC 37's initiative across all creditors, something NYRA asserts it is unable to do in any situation. Rather, DC 37, if it truly believes in the merits of these suspect claims, should pursue these actions in state court at its own cost and expense.

4. As just noted, it is unclear whether the Court has the authority to appoint a trustee here. Although section 926 of the Bankruptcy Code does state that a court may appoint a trustee to pursue causes of action under section 548 or 550 of the Bankruptcy Code, among others, section 904 of the Bankruptcy Code prohibits the court from appointing a trustee in a chapter 9 case without the consent of the debtor. Now, the Debtor has filed a response to the Trustee Motion stating explicitly that it does not consent to the Trustee Motion or the distribution of any funds that may be recovered by a trustee. So, it appears that, without such consent, pursuant to the Bankruptcy Code, the Court may not appoint a trustee to pursue and recover fraudulent transfers. Indeed, this Court has itself previously acknowledged the unique judicial limits in the context of a chapter 9 case, and those limits are similarly in place here.

5. Assuming, *arguendo,* that the readily apparent jurisdictional hurdles are overcome, DC 37 has nevertheless failed to demonstrate that the statutory payments made by the Debtor that are at issue are subject to avoidance under the Bankruptcy Code. DC 37 has cited no authority in the Trustee Motion, and NYRA is aware of none, that supports a finding that payments made on legitimate antecedent debt pursuant to a state statute, such as those made by NYC OTB to the New York Tracks, can be avoided. A holding in this case that the payments made pursuant to the New York Racing, Pari-Mutuel Wagering, and Breeding Law (the "Racing

Law") can be avoided would subject other types of statutorily-mandated payments to avoidance as fraudulent transfers. It is also indisputable that the statutorily-mandated payments to the New York Tracks were in exchange for reasonably equivalent value and the Court of Appeals of New York, the highest court within the New York State judicial system, has already determined so.

6. Moreover, even if this Court determined that it did have the authority to appoint a trustee to seek to avoid the statutorily-mandated payments, and the trustee were successful in recovering the transfers, the property would return to the Debtor who holds the exclusive right to use it under section 904 of the Bankruptcy Code. The Court could not direct the Debtor to use those payments to fund obligations to DC 37's retirees or even to pay the trustee.

7. The appointment of a trustee in this case for the purpose of pursuing and recovering prepetition payments made by NYC OTB to the New York Tracks also raises policy concerns regarding the New York racing industry. All of the parties in interest in this chapter 9 case, from DC 37 to the New York Tracks, have suffered substantial financial losses due to the failure of NYC OTB and will continue to suffer such losses due to the closure of NYC OTB. As set forth below, based upon the circular nature of any ultimate relief, nothing can be gained from attempting to further deplete the New York Tracks' pockets. The Trustee Motion and the relief requested therein must be denied.

BACKGROUND

8. On December 3, 2009 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 9 of the Bankruptcy Code [Docket No. 1]. NYRA contested the requested relief and, after a trial, on March 22, 2010, the Court entered its Opinion and Order Overruling Objections of New York Racing Association, Inc., New York Thoroughbred

Horsemen's Association, Inc., and New York Thoroughbred Breeders, Inc. to Debtor's Bankruptcy Petition and Statement of Qualifications Under Section 109(c) [Docket No. 63] (the "March Opinion) and an Order for Relief in the chapter 9 case [Docket No. 64].

9. On April 5, 2010, NYRA filed a notice of appeal from the Court's March Decision and Order for Relief. The appeal, as well as the Debtor's Motion to Dismiss, are pending before the Honorable Judge Miriam G. Cedarbaum in the Southern District of New York as *The New York Racing Association, Inc. v. New York City Off-Track Betting Corp.*, Case No. 10 Civ. 03958 (MGC) (the "Appeal"). In the event that this Court grants the Dismissal Motion, the need for the Appeal will be obviated and a status conference with respect thereto is scheduled for January 21, 2011.

10. The Debtor is a domestic public benefit corporation that operates a regional off-track pari-mutuel betting system on thoroughbred and harness horse races held at race tracks located throughout New York State (the "State"), and certain race tracks located in other states or foreign countries. The State Legislature created NYC OTB in 1970 to (1) raise revenues for the state and certain municipalities; (2) prevent illegal wagering on horse races; and (3) operate "in a manner compatible with the well-being of the [State] horse racing and breeding industries . . . ."[1] Racing Law § 518. The Racing Law provides a statutory framework for, *inter alia*, the regulation of NYC OTB's operation and management of pari-mutuel betting. Included within such framework is a statutory formula for mandatory distributions from NYC OTB to the State and, in an effort to foster employment within the State and greater revenues for the State, to various entities that contribute to the State's horse racing industry. In that regard, the Racing Law directs NYC OTB to pay certain percentages of the total amount wagered on a race through

[1] The regulatory power of the State under the Racing Law is thus a combination of an exercise of "police power" and economic regulation.

its services (the "Handle") to, among others, NYRA on (a) NYRA's thoroughbred horse races held at Aqueduct Racetrack ("Aqueduct"), Belmont Park ("Belmont"), and Saratoga Race Course ("Saratoga," and collectively with Aqueduct and Belmont, the "Racetracks") and (b) thoroughbred horse races held at race tracks located outside the State that are simulcast[2] at the Debtor's facilities. *See* Racing Law §§ 527(3), 1016, 1018.[3]

11. DC 37 and the New York Tracks are members of the Creditors' Committee. Since its inception, the Creditors' Committee and the Debtor met on a regular basis in an effort to negotiate a plan of adjustment that addressed the operational and financial needs of the Debtor and provided for the survival of the New York Tracks, the clear statutory mandate of NYC OTB, the ongoing employment of members of DC 37 and the continued payment of contractual benefits to DC 37's constituency.

12. On November 29, 2019, NYC OTB filed its First Amended Debt Adjustment Plan [Docket No. 220] and a revised Disclosure Statement [Docket No. 221]. On November 30, 2010, NYC OTB filed its Second Amended Debt Adjustment Plan (the "Plan") [Docket No. 231] and a further revised Disclosure Statement [Docket No. 232]. As significant concessions by the New York Tracks were contemplated by the Plan and modifications to the

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[2] Section 1001 of the Racing Law defines "simulcast" as the telecast of live audio and visual signal of a horse race for the purpose of pari-mutuel wagering.

[3] Pursuant to section 527(3) of the Racing Law, NYRA is entitled to receive 6.5% of each dollar wagered through NYC OTB's services on a race held at a Racetrack. Pursuant to sections 1016 and 1018 of the Racing Law, on days when NYRA holds thoroughbred race meetings, NYC OTB is statutorily obligated to pay to NYRA fees ranging from 2% to 6.5% of Handle derived from NYC OTB's simulcasting of out-of-State thoroughbred races, depending on the type of wager (regular, multiple, or exotic), timing of the simulcast signal (initial, or other than initial), and whether or not NYRA is conducting a race meeting at Saratoga. On days when NYRA is not holding a thoroughbred race meeting at a Racetrack, sections 1016 and 1018 of the Racing Law require NYC OTB to pay to NYRA between 2% and 5.5% of the Handle derived from NYC OTB's simulcasting of out-of-State races, depending on whether certain other race tracks within the State are holding race meetings.

Racing Law, implementation of the Plan was contingent upon the passage of proposed legislation by the New York State Assembly and Senate.

13. On December 1, 2010, the Court entered an Order Approving Disclosure Statement, Establishing A Record Date, Approving Ballots And Solicitation Procedures And Establishing Confirmation Procedures [Docket No. 253].

14. On November 30, 2010, the New York State Assembly passed a bill that was substantially similar to the legislation contemplated under the Plan, but, on December 7, 2010, the New York State Senate failed to pass the proposed legislation or any variation thereof.

15. Thereafter, at the direction of its State-appointed board of directors, NYC OTB ceased operations, established a procedure to honor uncashed tickets and has wound up its business in accordance with the requirements of the Racing Law and at the direction of its State regulatory body, the New York State Racing and Wagering Board (the "Racing Board").

ARGUMENT

I. The Court Should Dismiss NYC OTB's Chapter 9 Case

16. Pursuant to section 930(a) of the Bankruptcy Code, a court may dismiss a case under chapter 9 for "cause." 11 U.S.C. § 930(a). Although section 930 of the Bankruptcy Code includes a list of circumstances warranting dismissal for "cause," such list is nonexhaustive. In fact, although not listed, courts have held that a chapter 9 debtor's request for dismissal constitutes sufficient "cause" to dismiss. *In re Richmond Unified Sch. Dist.*, 133 B.R. 221, 224 (Bankr. N.D. Cal. 1991). No evidentiary showing that dismissal would be in the best interest of creditors is required. *Id.*

17. In addition, because a chapter 9 debtor holds the exclusive right to propose a plan for the adjustment of debts pursuant to section 941 of the Bankruptcy Code, it would be

futile not to grant a debtor's request for dismissal in the instance where the debtor has ceased operations, stated that it has no present intention to restart operations and, as here, has indicated that it has no intention of filing a plan. 11 U.S.C. § 941. Similarly, the Court must dismiss a case under section 930(b) of the Bankruptcy Code if confirmation of a plan is refused. Although confirmation has not been refused in the instant case, the Debtor's cessation of operations and withdrawal of the Plan due to the inability to gain legislative support is a *de facto* acknowledgement that no plan of adjustment can be confirmed. The circumstances of the Debtor's case warrant dismissal under section 930(b) of the Bankruptcy Code.

II. The Court Should Dismiss DC 37's Motion for the Appointment of a Trustee

A. DC 37 Will Not Be Prejudiced If A Trustee Is Not Appointed

18. Stated simply, the closure of the Debtor's chapter 9 case, without the appointment of a trustee, will not in any way affect DC 37's rights to pursue any fraudulent conveyance actions that it might have against the New York Tracks, or any other party, in state court. *See In re Richmond Unified Sch. Dist.*, 133 B.R. 221, 226 (Bankr. N.D. Cal. 1991) (holding that, where teachers' union opposed the chapter 9 debtor's motion to dismiss the case on grounds that other creditors were receiving unfair advantage, among other things, "no legal prejudice to any party in interest will result from dismissal of the present case . . . . a dismissal will operate to restore to the creditors and other parties in interest all their procedural and substantive rights under applicable nonbankruptcy law that the petition stayed" (citing *Schroeder v. Int'l Airport Inn P'ship (In re Int'l Airport Inn P'ship)*, 517 F.2d 510 (9th Cir. 1975) and *Gill v. Hall (In re Hall),* 15 B.R. 913 (B.A.P. 9th Cir. 1981)). Indeed, once the chapter 9 case is dismissed, DC 37 is free to pursue its rights under chapter 12, article 10 of the New York Debtor Creditor Law which DC 37 acknowledges in the Trustee Motion is "almost identical to section

548 of the Bankruptcy Code, except that it employs the term 'fair consideration' rather than 'reasonably equivalent value' and has a longer reach-back period of six years as compared to the two years afforded by section 548." (Trustee Motion, ¶ 26.) So, recovery, if any, obtained by bringing a state court fraudulent conveyance action stands to be greater than if the same claims were pursued under the Bankruptcy Code.

19. Similarly, the Debtor acknowledged the preservation of parties' rights when it stated that "[n]o legal prejudice results from dismissal of the case . . . as creditors and other parties in interest retain their rights under applicable nonbankruptcy law" (Dismissal Motion, ¶ 16), and reiterated that "After dismissal, creditors and parties in interest will retain their rights under applicable nonbankruptcy law." (Dismissal Motion, ¶ 17.) Notably, DC 37 does not dispute this basis tenet or even assert that it lacks standing to assert a fraudulent conveyance claim. Consequently, the effort behind the Trustee Motion and burdening this Court therewith is stupefying.

B. The Issue of Whether Any Payments Made by NYC OTB to the New York Tracks Are Fraudulent Conveyances Should Not be Adjudicated In the Bankruptcy Court

20. As the Court is well aware, and has even opined upon, many of the principles that apply in the context of other chapters of the Bankruptcy Code do not apply in the context of chapter 9 because, unlike other chapters, chapter 9 is not tailored towards balancing the rights of the debtor and creditors, but rather, is intended to meet solely the special needs of a municipal debtor. The legislative history for chapter 9 confirms this fact: "A municipal unit cannot liquidate its assets to satisfy its creditors totally and finally. Therefore, the primary purpose of Chapter 9 is to allow the municipal unit to continue operating while it adjusts or refinances its creditor claims . . . ." H.R. Rep. No. 95-595, at 263 (1977), *reprinted in* 1987

U.S.C.C.A.N. 5787, 6221. Indeed, as previously recognized by this Court,[4] the court in a chapter 9 case is expressly prohibited from interfering with certain powers of the debtor, including interference with "any of the property or revenues of the debtor." 11 U.S.C. § 904(2). Accordingly, the court may not appoint a trustee to manage or control the debtor, irrespective of cause. *In re Richmond Unified Sch. Dist.*, 133 B.R. at 225.

21. Although section 926 of the Bankruptcy Code states that, "[i]f the debtor refuses to pursue a cause of action under section 544, 545, 547, 548, 549(a), or 550 of this title, then on request of a creditor, the court may appoint a trustee to pursue such causes of action," this section cannot be reconciled with the fact that under section 904 of the Bankruptcy Code, a debtor must, as an initial matter, consent to such appointment before the court has the discretion to appoint a trustee to pursue avoidance actions. 11 U.S.C. § 926(a); 11 U.S.C. § 904(2) ("Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with . . . any of the property or revenues of the debtor"). As Collier on Bankruptcy explains, section 904 supersedes any power granted to the Court under section 926(a) of the Bankruptcy Code, and as such, section 904 of the Bankruptcy Code prohibits the Court from appointing a trustee to pursue avoidance actions against the New York Tracks without the Debtor's consent. 6 COLLIER ON

[4] In this Court's March Opinion, the Court stated that "[p]rinciples of dual sovereignty, deeply embedded in the fabric of this nation and commemorated in the Tenth Amendment of the United States Constitution, severely curtail the power of bankruptcy courts to compel municipalities to act once a petition is approved" and that "[t]his fundamental constitutional principle halts bankruptcy courts from regulating or otherwise controlling expenditures or activities of municipalities . . . . Congress deemed this principle so important it explicitly recognized the limits of bankruptcy courts' powers in section 904." (March Opinion at p. 8-9.). On August 5, 2010, the Court reiterated its position regarding the limits placed on it in the chapter 9 context in its Memorandum Opinion and Order Denying In Part and Abstaining in Part to Motions to Compel the Debtor to Comply With the Requirements of the New York Racing, Pari-Mutuel Wagering and Breeding Law and Make Certain Statutory Distributions [Docket No. 138] (the "August Opinion") stating that "section 904 of the Bankruptcy Code places severe limits on the power of courts to compel any action from chapter 9 debtors . . . . Section 904's command is clear. A bankruptcy court may not interfere with a chapter 9 debtor's political or governmental powers, or the use of the debtor's property, without the debtor's consent." (August Opinion at p. 12.) The Court further clarified in that opinion that "a chapter 9 debtor cannot consent to a court order that would violate state law or administrative order." (August Opinion at p. 13.)

BANKRUPTCY § 926.02[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("when the debtor has made a prepetition transfer in the exercise of its political or governmental functions, or in control of its income or property, the appointment by the court of a trustee to undo that transfer may constitute an interference with those powers or with that property, contrary to the mandatory dictates of section 904, which supersedes any power granted to the court under section 926(a)."). As noted above, the Debtor has filed its response to the Trustee Motion [Docket No. 275], and states that it does not consent to the Trustee Motion or the distribution of any funds that may be recovered by a trustee. In reality, nothing more need be said.

22. But, to be complete, NYRA is also not aware of any mechanism that would allow the Court to keep the Debtor's case partially open for the purpose of having a court-appointed trustee pursue avoidance actions, as suggested by DC 37. Nothing in section 930 of the Bankruptcy Code, or any other section of the Bankruptcy Code, provides such a mechanism. Furthermore, it would be counterintuitive to allow for a chapter 9 case to remain partially open, because of the fact that there can be no involuntary liquidation or use of any of the debtor's assets, as the debtor holds the exclusive right to file a plan and distribute its property or revenues.

C. DC 37 Has Failed to Prove that Any of the Allegations Have Merit

23. Assuming, *arguendo,* that the readily apparent jurisdictional hurdles are overcome, the relief requested in the Trustee Motion must be denied because DC 37 has failed to show that (i) the payments made by NYC OTB pursuant to the Racing Law are even subject to avoidance due to their nature as statutorily-mandated payments, and (ii) the factors required to be proven for payments to be avoided and recovered pursuant to section 548 and 550 have been met in the instant case. [5]

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[5] In the chapter 11 context, courts in the Second Circuit only grant standing to a creditor to initiate an adversary proceeding on behalf of the debtor when the debtor has unjustifiably refused to commence an action that is likely to

a. Statutory Payments Not Avoidable

24. Section of 903 of the Bankruptcy Code provides that the court does not have the power to impair the State's ability to control its municipality. 11 U.S.C. § 903 ("This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise . . ."). This limitation placed on the Court by section 903 also applies to the Court's ability to appoint a trustee that would exercise power over NYC OTB's expenditures under the Court's mandate. Thus, in accordance with section 903 of the Bankruptcy Code, the Court does not have the power to appoint a trustee to avoid the statutorily-mandated payments at issue and must give effect to the state law in place, *i.e.* the Racing Law.

25. The payments that DC 37 alleges are subject to avoidance were made pursuant to the Racing Law and were thus statutorily mandated payments. *See* Racing Law §§ 527(3), 1016, 1018. As none exist, DC 37 has cited no case in the Trustee Motion to support a finding that such payments, or any payments made pursuant to a state statute (*e.g.*, a tax payment), can be avoided pursuant to the Bankruptcy Code or otherwise. This Court has itself expressed that, irrespective of its powers under the Bankruptcy Code, it cannot rewrite New York State statutes, which is *de facto* what it would be doing if it were to appoint a trustee to avoid the statutorily-mandated payments. (March Opinion at p. 42) ("NYC OTB does not ask this Court to rewrite New York State statutes; nor could this Court do so. The New York State

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benefit its estate. *See In re Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 99-100 (2d Cir. 2001); *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904-905 (2d. Cir. 1985). The rationale is that while the court need not conduct a trial on the facts in deciding whether to grant a creditor the right to initiate an adversary proceeding on behalf of the debtor, "it should assure itself that there is a sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely product." *See STN*, 779 F.2d at 905-906. The same rationale should apply here.

legislative and executive branches hold the power to make the statutory changes needed for NYC OTB to survive – nothing in the Bankruptcy Code changes this fact.”). Thus, the payments that DC 37 seeks to have pursued and recovered should not even be subject to avoidance under the provisions of the Bankruptcy Code, or, for that matter, otherwise applicable state law.

b. Reasonable Equivalent Value Exists

26. Assuming, *arguendo*, that the Court maintains jurisdiction to unwind payments made pursuant to the Racing Law, the New York State Court of Appeals has already held that distributions made by off-track betting corporations in New York pursuant to the Racing Law are made in exchange for reasonable value. *Suffolk Regional Off-Track Betting Corp. v. New York State Racing & Wagering Bd. (In re Suffolk Regional Off-Track Betting Corp.)*, 900 N.E.2d 970, 974 (N.Y. 2008) (“The [section 1017 of the Racing Law] establishes the baseline, or minimum, amounts that OTBs must pay to harness tracks *for the privilege of simulcasting* evening thoroughbred races”) (emphasis added). NYC OTB was one of the five OTBs involved in the *Suffolk Regional Off-Track Betting Corp.* case and has not appealed the decision. Accordingly, the New York Court of Appeal’s holding regarding the fact that NYC OTB received substantial benefits in exchange for the obligation to pay the indirect commissions still applies. The issue has also been discussed, and the same conclusion reached, in the context of this chapter 9 case. At the July 13, 2010 hearing in this chapter 9 case, NYC OTB confirmed that its privilege to simulcast races was conditional upon its payment of commissions and that it would not have been able to simulcast out-of-state races had it not made indirect commission payments in the years preceding its chapter 9 filing. (July 13, 2010 Hr’g Tr. at 37: 17-25; 39:4-17). In fact, at that hearing, it was also made evident that the Racing Board prohibited NYC OTB from simulcasting out-of-state races after NYC OTB stopped making

indirect commissions payments in March of 2010. Thus, because the New York State Court of Appeals decision has not yet been appealed, and the relevant finding confirmed by testimony heard before the Court in this case, DC 37 is precluded from bring arguments to the contrary in a state court action for recovery.

D. **The Bankruptcy Code Prohibits Any Recovery From Being Ordered to Be Used As A Source of Funding for Trustee's Fees and DC 37's Obligations**

27. As discussed, section 904 of the Bankruptcy Code limits the power to use or distribute any of the Debtor's property or revenues to the Debtor itself. 11 U.S.C. § 904. Thus, in accordance with section 904 of the Bankruptcy Code, any transfers that a trustee might avoid would merely result in the respective payments being returned to the Debtor's possession for distribution or use in accordance with its own directives. This would mean that none of the funds from the payments avoided could be ordered to be used either for payment of the trustee's fees or for payment of DC 37's retiree obligations. Presumably, the Debtor would abide by the Racing Law and return such funds to the New York Tracks. So, any recoveries would be pyrrhic and, as a result, a waste of time, energy and resources.

E. **Pursuit of Avoidance Actions Would Further Harm the Racing Industry and is Otherwise Barred as Against NYRA**

28. Lastly, as the Court is well aware, NYRA recently went through its own chapter 11 case. Therein, the Court established a bar date, claims were filed, a chapter 11 plan was confirmed and consummated (September 12, 2008), and all claims against NYRA and its chapter 11 estate were discharged. *See* Order Confirming Modified Third Amended Plan of Debtor Pursuant to Chapter 11 of the United States Bankruptcy Code entered on April 28, 2008 [Docket No. 1008] in NYRA's chapter 11 case, *In re The New York Racing Association Inc.*, 06-12618 (JMP). Accordingly, none of the claims stemming from prepetition actions of NYRA,

including substantially all of those which are referred to in the Trustee Motion, remain outstanding and all parties, including the Debtor and DC 37, are enjoined from any such pursuit.

29. Moreover, upon information and belief, as of the Petition Date, NYC OTB owed NYRA at least $12.4 million. *See also* Debtor's 11 U.S.C. § 924 List of Creditors [Docket No. 4] (scheduling prepetition indebtedness to NYRA as $14,695,315). Statutory payments owed to NYRA have continued to accrue on a postpetition basis. NYRA's books and records indicate that, as of January 11, 2011, NYC OTB owes NYRA approximately $7.0 million on a postpetition basis.

CONCLUSION

While NYRA understands the loss occasioned by DC 37, NYRA has lost over $20 million and, due to the loss of NYC OTB, which accounted for over forty percent (40%) of NYRA's revenues, it will continue to lose significantly in the immediate future. All parties must address these losses and not by reaching out on a frolic — like the filing of the Trustee Motion — all in an effort to bring spurious litigation that has no chance of succeeding or providing any benefit.

WHEREFORE NYRA respectfully requests that the Court dismiss the Debtor's chapter 9 case, deny the relief requested in the Trustee Motion and grant NYRA such other relief as the Court deems just and proper.

Dated: New York, New York
January 12, 2011

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